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NO. 349, OCTOBER TERM, 1948.

IN THE

SUPREME COURT OF THE UNITED STATES.

SOUTHEASTERN GREYHOUND LINES and
G. D. (HAPPY) MASTERS,
Petitioners,

vs.

FRANK A. McCAFFERTY,
Respondent.

RESPONSE AND BRIEF

Of Respondent to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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STATEMENT.

The response to the petition for a writ of certiorari will take up the petition in paragraphs as enumerated by the petitioners.

1. Statement of petitioners in Paragraph 1 is admitted.

2. Statement of petitioners in Paragraph 2 is admitted.

3. Statement of petitioners in Paragraph 3 is admitted.

4. Statement of petitioners in Paragraph 4 is admitted.

5. Upon the trial of the issues before a jury, the verdict was rendered for plaintiff in the sum of $12,005.50.

6. The statement of petitioners with reference to the form of verdict submitted by the court is admitted. The verdict was returned at 5:00 P. M., and at 5:05 P. M., same day, the court adjourned finally. The following day, it was discovered that the name "G. D. (Happy) Masters" had a single, dim pencil line drawn through it. Thereafter, the court entered a judgment against the Southeastern Greyhound Lines and entered no judgment of any kind, for or against, the petitioner, Masters,

7. Respondent admits statement of petitioners in Paragraph 7 as to the motion and grounds for a new trial being filed, but states that it was filed 26 May.

8. The respondent admits petitioners' statement in Paragraph 8 and adds to it that the order entered overruling the motion and grounds for a new trial was entered 28 May, and that the motion to set aside the order overruling the motion and grounds for a new trial and the motion for a judgment notwithstanding the verdict was filed 21 June.

9. The respondent admits the statement of petitioners in Paragraph 9.

ARGUMENT.

Comes Frank A. McCafferty, Respondent, and says that the petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit should be denied for the reasons hereinafter set out.

The decision of the district court and the circuit court of appeals held that there was no finding for or against the servant, Masters. The action of the District Court and the Circuit Court of Appeals does not violate the doctrine laid down in the Erie Railroad Company v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, because the precise question determined by the District Court and the Circuit Court of Appeals has never been presented in that form to the Court of Appeals of Kentucky. Where this situation exists, it is entirely fitting and proper for the Federal Courts to exercise their own judgment in order that justice may be done. It is not definitely known who drew the single pencil line through the name of Masters. It was not even discovered by anyone until the following day after the verdict was rendered and after the court had finally adjourned.

The petitioners complain of the following language used in the opinion of the Circuit Court of Appeals:

> "He was not required to obtain a verdict and judgment of liability against Masters individually as a prerequisite to recovery against Southeastern."

We think that the Circuit Court of Appeals was absolutely correct in this statement, as we think it is the universal rule, and too elementary to require citations of authority to state, that the respondent could have sued either the Southeastern Greyhound Lines or Masters. Even if the statement of the petitioners is true, which we vigor-

ously deny, that the Kentucky law is that the verdict in this case is a verdict in favor of Masters and against the Southeastern Greyhound Lines, the petitioners must avail themselves of this error by proper procedure. The Federal Rules of Procedure, and not Rules of State Practice, govern in Federal Courts.

In Haufman v. Atlantic Greyhound Corporation, 41 Fed. Supp. 252, the court said:

> "Since this is a matter of procedure, Rules of State Practice are not followed in the Federal Courts."

In Aetna Casualty and Surety Company v. Yeatts, 122 Fed. 2d 350, 4th Circuit, Judge Parker, speaking for the court, said:

> "The motion to set aside the verdict and grant a new trial was a matter of federal procedure governed by Rule of Civil Procedure 59 and not subject in any way to the rules of state practice."

The verdict was returned 23 May, the judgment entered 24 May, motion and grounds for a new trial was filed 26 May, order overruling motion and grounds for a new trial was entered 28 May, and the motion of the petitioners to set aside the order denying the new trial and permit them to file additional motion and grounds for a new trial and a judgment notwithstanding the verdict was filed 21 June.

The Circuit Court of Appeals said that the motion of petitioners of 21 June was in substance a motion for a judgment notwithstanding the verdict. It was unauthorized for two reasons: (1) because petitioners, Southeastern Greyhound Lines et al., had never moved for a directed verdict at any time during the progress of the trial and (2) because it was filed more than ten days after the verdict [Rule 50 (b), Rules of Civil Procedure].

If this action by the petitioners, Southeastern Greyhound Lines et al., be considered to be a motion for a new trial, it still was not filed in time [Rule 59 (b) of the Rules of Civil Procedure.] For this reason, the cases cited by the petitioners, to-wit: Ruehling v. Pickwick Greyhound Lines, 334 Mo. 1078, is not applicable, since Federal Courts are governed by Federal Rules of Procedure, and the Federal Rules of Procedure do not authorize an appeal unless taken in accordance with the rules. Even under Kentucky Rules of Practice, petitioners would have had to file motion and grounds for a new trial and a proper bill of exceptions as was done in all the Kentucky cases cited by petitioners in order for the appellate court to hold according to their views. Where there is no timely motion for a new trial or a timely motion for a judgment notwithstanding the verdict, the sufficiency of the plaintiff's petition to sustain the judgment would be all that even the Kentucky courts could pass on. Johnson et al. v. Hall Hotel Company, 306 Ky. 140, 206 S. W. (2d) 490; Wardrup v. Johnson et al., Bell Grocery Company v. same, 298 Ky. 797, 184 S. W. (2d) 85; Hickey v. Glass, 285 Ky. 484, 149 S. W. (2d) 535. There is no place in the record where the petitioners contend that the original petition is not sufficient to sustain the verdict. We see (1) that we are proceeding under the Federal Rules of Procedure and the petitioners have failed to comply with these rules, (2) that if we were proceeding under the Rules of Procedure for the Commonwealth of Kentucky, which we are not, they would still have failed to comply with such rules.

Bateman v. Donovan, 131 Fed. (2d) 759, C. C. A. 9, does not hold as represented by the petitioners. Petitioners make this quotation:

> "It appears that the trial court granted a new trial; and subsequently, on motion of the appellees, filed 47 days later, setting aside such order, the question was

presented whether the District Court had power to reconsider its order granting a new trial, and the Ninth Circuit Court held:

> 'It is true that the Rules of Civil Procedure make no provision for such action, but it is likewise true that they do not forbid it.'

"The Court also pointed out that under the Federal Rules of Civil Procedure the court has the power to vacate any final decrees of judgment."

As a matter of fact, the court said in that case that it had power to vacate even final decrees at any time within the term. And that when a new trial was granted, the case remained within the power of the court to alter that decree since such decree was merely interlocutory.

In this case, the motion and grounds for a new trial was overruled; and then after the expiration of the ten days, and after the District Court had finally adjourned and lost control of the judgment, the petitioners attempted on 21 June to file additional grounds for a new trial or motion for judgment notwithstanding the verdict, whichever it might have been. In either case, the District Court had lost control of the case and the petitioners had lost their rights under the Federal Rules of Procedure by failing to make their motions in a proper manner or within the required time.

National Popsicle Corporation et al. v. Hughes, 32 Fed. Supp. 397, does not hold as represented by the petitioners, but holds absolutely to the contrary. The court said:

> "Unless, however, the time limit for taking proceedings to modify or vacate a final judgment is otherwise specified in the Federal Rules of Civil Procedure, that limit is still the expiration of the term in which the judgment became final. It would be contrary to

sound reasoning as well as settled principles of federal law to construe Rule 6 (c) to mean that a court has continuing jurisdiction over its final judgments and decrees. The power of the court over its final judgments must end some time. If the period of termination is specified in the Rules of Civil Procedure, that period governs. Otherwise, the end of the term marks the termination of the court's power, in accordance with settled law."

The District Court and the Circuit Court held:

1. That respondent could have sued either of the petitioners and that the evidence did support the judgment.

2. That there was no judgment either for or against Masters and a mistrial or no trial so far as he was concerned.

3. That even if the verdict had been construed as a verdict for Masters and against the Southeastern Greyhound Lines, the petitioners failed (a) to move for a directed verdict at any time (b) to bring the verdict to the court's attention in a motion and grounds for a new trial in time (c) to move for a judgment notwithstanding the verdict in time.

4. (a) That the Federal Rules of Procedure govern.

(b) Even if the State Rules of Procedure govern, the petitioners did not proceed properly and timely.

The petitioners state that the decision of the Circuit Court of Appeals below is in conflict with the Ninth Circuit Court of Appeals on the same question. They cite no authority in support of it. The courts have said:

"As to questions controlled by state law, conflict among circuits is not of itself a reason for granting a writ of certiorari. Supreme Court rules, Rule 38

(5), 28 U. S. C. A. following section 354." Ruhlin et al. v. New York Life Insurance Company, 58 S. Ct. 860, 304 U. S. 202.

The courts have said that the discretion vested in the supreme court to review the decisions of the circuit court of appeals by certiorari, Act. Cong. March 3, 1891, Sec. 6, 26 Stat. 828, will only be exercised in matters of gravity and general importance. In re Woods, 12 S. Ct. 417, 143 U. S. 202. The Supreme Court further said that the jurisdiction conferred on the Supreme Court to review decrees of circuit court of appeals on certiorari was not conferred merely to give the defeated party another hearing, but to secure uniformity of decision and to bring up cases of importance which it is in the public interest to have decided by the court of last resort. Magnum Import Co. v. Coty, 43 S. Ct. 531, 262 U. S. 159.

Even if the petitioners had proceeded properly and timely to call the attention of the court to the verdict, the decision of the District Court and of the Circuit Court in no wise violates the law as stated in the Erie Railroad Company case, supra, because the precise question here presented has never been presented to the Court of Appeals of Kentucky; and we feel sure if it should be presented to the Court of Appeals of Kentucky that it would show the same reasoning as the District Court and the Circuit Court did.

The respondent had a meritorious cause. He introduced sufficient evidence to sustain his case. The misunderstanding or error, if any, arose because of error in the instructions of the District Court. That error was never brought to the court's attention in any legal manner. To deprive respondent of his judgment in the summary manner in which petitioners are attempting to do so would be a travesty on justice and not only be contrary to the

letter of the law, but would likewise be contrary to the spirit of the law.

We do not think that this is a case of gravity or of such general importance that it would warrant a writ of certiorari or a review by the Supreme Court.

CONCLUSION.

We earnestly insist that this matter has been heard and seriously considered by the District Court and the Circuit Court of Appeals and that their conclusions of law and facts have been correctly reached and the application of petitioners should be denied.

Respectfully submitted,

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